

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:MAN:2:TL-N-3411-01
PLDarcy

date:

to: Richard Fleming, Territory Manager,
Communications, Technology & Media
Attn: Howard Pluskalowski, Senior Team Coordinator
John Mezquita, Revenue Agent

from: Area Counsel, LMSB (Financial Services)

subject:

EIN: [REDACTED]
Tax Years Ending: [REDACTED], [REDACTED] and [REDACTED]
Form 872 Restrictive Language
Statute of Limitations expires [REDACTED]
UIL No. 6501.08-17

This memorandum responds to your request for assistance dated May 29, 2001. Specifically you have requested that we provide you with the appropriate restricted language to use on Form 872, Consent to Extend the Time to Assess Tax, to extend the statute of limitations on assessment of tax of [REDACTED] [REDACTED] for the taxable years ending [REDACTED], [REDACTED] and [REDACTED]. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about this advice. This memorandum should not be cited as precedent.

ISSUE

What language should be used to restrict a Form 872 to particular issues for [REDACTED] [REDACTED] (" [REDACTED] ") for the taxable years ending [REDACTED], [REDACTED] and [REDACTED].

FACTS

You have only requested advice concerning restrictive language and not any other aspect of the Form 872. The statute of limitations for assessment for the taxable years ending [REDACTED]

[REDACTED], [REDACTED] and [REDACTED] expires on [REDACTED], pursuant to an agreement in Forms 872 countersigned by the Internal Revenue Service on [REDACTED] (the "prior Forms 872"). The prior Forms 872 were general agreements to extend the statute of limitations; however, in a separate document the Internal Revenue Service agreed to restrict the Forms 872 to specific items. A copy of the prior Forms 872 and side agreement are attached as Exhibit A.pdf.

The Internal Revenue Service and [REDACTED] have reached agreement on most of the issues audited for the taxable years ending [REDACTED] and [REDACTED]. The agreed issues are set forth in a Form 4549-B, Revenue Agent Report dated [REDACTED] [REDACTED] ("RAR"). A copy of the RAR dated [REDACTED] is attached hereto as Exhibit B.pdf.

The only outstanding substantive issue for the taxable years ending [REDACTED] and [REDACTED] involves [REDACTED]'s method of accounting for depreciation or amortization for [REDACTED] and [REDACTED]. The parties' Request for Technical Advice Memorandum ("TAM") on this issue is pending with the National Office. If the National Office sustains the Examination Team's TAM position, there will also be an adjustment in the taxable year ended [REDACTED] related to [REDACTED]'s method of accounting for depreciation or amortization for [REDACTED] and [REDACTED].

For the taxable years ending [REDACTED] and [REDACTED] both the Service and [REDACTED] want to limit the extension of the statute of limitations to the following issues:

1. Adjustments attributable to such issues determined by the IRS examiners, as agreed to by [REDACTED] and reflected in the RAR.

2. Adjustments arising out of the Internal Revenue Service's examination of [REDACTED]'s method of accounting for depreciation or amortization for [REDACTED] and [REDACTED].

3. Correlative and consequential income tax adjustments arising out of the above-referenced adjustments.

For the taxable year ending [REDACTED] both the Service and [REDACTED] want to limit the extension of the statute of limitations to the following issues:

1. Income tax adjustments arising out of any carryover consequences from prior years.

2. Adjustments arising out of the Internal Revenue Service's examination of [REDACTED]'s method of accounting for depreciation or amortization for [REDACTED] and [REDACTED].

3. Correlative and consequential income tax adjustments arising out of the above-referenced adjustments.

DISCUSSION

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent.

The Internal Revenue Manual, Sub-Subsection 4541.72 states that extreme care should be taken in writing restrictive language in a consent. The restriction should not foreclose utilization of alternative rationales in making the adjustment if such action becomes necessary. The restrictive language should describe the area of consideration rather than the proposed tax treatment. Code sections should not be included in the restrictive language. Each restricted consent must contain a basic restrictive statement and a description of the area of consideration. The basic restrictive statement is as follows:

The amount of any deficiency assessment is to be limited to that resulting from any adjustment to (description of the area of consideration) including any consequential changes to other items based on such adjustment.

Type the restrictive statement on consent Form 872 in the space between the printed text and the first signature line. A footnote should be added to the consent stating, "The provisions of section 6511(c) of the Internal Revenue Code are limited to any refund or credit resulting from adjustment for which the period for assessment is extended under this agreement."

Taxable Years Ending [REDACTED] and [REDACTED]

For the taxable years ending [REDACTED] and [REDACTED], we suggest that you use the following restrictive language:

The amount of any deficiency assessments are to be limited to that resulting from any adjustment to:

1. Income tax adjustments attributable to such issues determined by the Internal Revenue Service examiners, as agreed to by [REDACTED] (EIN: [REDACTED]) and reflected on Form 4549-B, Revenue Agent Report ("RAR") dated [REDACTED]. A copy of the RAR dated [REDACTED] is attached hereto;

2. Income tax adjustments arising out of the examination of [REDACTED] method of accounting for depreciation or amortization for [REDACTED] and [REDACTED]; and

3. Any correlative or consequential changes to other items based on tax adjustments arising out of the above-referenced adjustments.

Alternatively, you may use the following restrictive language

The amount of any deficiency assessments are to be limited to that resulting from any adjustments to:

(here you list the specific issues)

including any consequential changes to other items based on such adjustments.¹

Taxable Year Ending [REDACTED]

For the taxable year ending [REDACTED], we suggest you use the following restrictive language:

The amount of any deficiency assessment is to be limited to that resulting from any adjustments to:

1. Income tax adjustments arising from any loss or credit carryover from prior taxable years claimed by [REDACTED] (EIN: [REDACTED]) on its return for the taxable year ending [REDACTED].

2. Adjustments arising from [REDACTED] method of accounting for depreciation or amortization for [REDACTED] and [REDACTED].

3. Any correlative or consequential changes to other items based on tax adjustments arising out of the above-referenced adjustments.

¹ As a practical matter, we do not think there is enough room on a Form 872 to list all the necessary adjustments.

Alternatively, you may use the following restrictive language

The amount of any deficiency assessment is to be limited to that resulting from any adjustments to:

(here you list the specific issues)

including any consequential changes to other items based on such adjustments.²

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the I.R.S. Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service, each time that it requests a taxpayer to extend the limitations period, to advise the taxpayer of the right (i) to refuse to extend the statute of limitations on assessment, or, in the alternative, (ii) to limit an extension to particular issues or for specific periods of time. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the consent. Alternatively, you may advise the taxpayer in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the IRM requires use of Letter 907(DO) to solicit a Form 872, Letter 928(DO) as a follow-up letter to Letter 907(DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Form 872 is received from the taxpayer, the authorized manager should promptly sign and date it in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM, Handbook No. 121.2.22.5.10. The manager must also update the respective statute of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If

² Supra n.1.

disclosure becomes necessary, please contact this office for our views. Should you have any questions regarding this matter, please contact Paul Darcy of this office at (212) 264-1595, ext. 256.

ROLAND BARRAL
Area Counsel, LMSB
(Financial Services)

By: _____
PAUL L. DARCY
Attorney